STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

JEANNE and KRISTIN OMELENCHUK,
Co-Personal Representatives of
the Estate of George Omelenchuk,

Plaintiffs-Appellees,

v

THE CITY OF WARREN and the
WARREN FIRE DEPARTMENT,

Defendants-Appellants.
_____/

S. Ct. No. 117252
[Former S. Ct. No. 114782]

C.A. No. 204098

L.C. No. 96-5448-NH

BRIEF OF AMICI CURIAE THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL

PROOF OF SERVICE

PLUNKETT & COONEY, P.C.

BY: MARY MASSARON ROSS (P43885)
CHRISTINE D. OLDANI (P25596)
Attorneys for the Michigan Municipal League and the Michigan Municipal League Liability & Property Pool
243 West Congress, Suite 800
Detroit, MI 48226-3260
(313) 965-3900

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INTRODUCTION

The Michigan Municipal League and the Michigan Municipal League Liability & Property Pool seek to address the interplay between the Emergency Medical Services Act and the Governmental Tort Liability Act because the effect of the court of appeals' decision is to deprive their members of protection from liability that has been duly granted by the Michigan Legislature.

The Michigan Municipal League is a non-profit Michigan Corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 513 Michigan cities and villages of which 427 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent its member city and villages in litigation of statewide significance. This brief amici curiae is authorized by the Legal Defense Fund's board of directors whose membership includes: the president and executive director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys: Philip A. Balkema, City Attorney, Grand Rapids; William B. Beach, City Attorney, Rockwood; John E. Beras, City Attorney, Southfield; Randall L. Brown, City Attorney, Portage; Abigail Elias, City Attorney, Ann Arbor; Catherine R. Ginster, City Attorney, Saginaw; Andrew J. Mulder, City Attorney, Holland; Debra A. Walling, Corporation Counsel, Dearborn; Eric D.

Williams, City Attorney, Big Rapids; and William C. Mathewson, General Counsel, Michigan Municipal League.

For its part, the Michigan Municipal League Liability and Property Pool was established under 1982 PA 138 to develop and to administer a group program of liability and property self-insurance for Michigan municipalities. The principal objectives of the Pool are to establish and to administer municipal risk management service, to reduce the incidents of property and casualty losses occurring in the operation of local governmental functions, and to defend the Pool's members against liability losses. Any city or village which is a member of the Michigan Municipal League or which is an instrumentality of any city or village or any governmental entity which holds service associate status with the Michigan Municipal League is eligible to participate in the Pool.

When inaugurated in December, 1982, the Pool had three member municipalities. Since that time, membership has grown dramatically. The Pool exclusively represents counties, municipalities, townships, and special districts in Michigan. Thus, the Pool is uniquely well equipped to serve the insurance needs of local units of government. Experience in Michigan and elsewhere has demonstrated that local governmental interests are better served when governmental units combine their efforts to maximize their legal defense, to assert governmental immunity, and to develop common defense strategies so as to minimize municipal liability.

The Pool operates solely to serve its members. It is member-controlled, non-profit, and tax exempt under §115 of the Internal Revenue Code. A board of

directors comprised of officials from its participating members governs the Pool. In their capacity as directors of the Pool, the board members are charged with representing the best interests of the Pool members, with overseeing Pool operations, and with evaluating the services of the Pool's contractors and staff. Cognizant of these obligations, the Pool's Board of Directors has authorized the filing of this brief.

It is apparent to Amici's respective directors and members that the Court's pronouncements on the interplay between EMSA and GTLA is a matter of paramount concern. If left standing, the Court of Appeals' decision could well wreak serious and disastrous ramifications on Amici's members. The Pool's ability to offer the broadest and best insurance coverage to Michigan municipalities at the lowest cost will be tested to the fullest while the salutary goals served by the Pool will be gravely threatened. Municipalities will be saddled with liability for conduct for which the legislature granted immunity. And that exposure and liability will hamper their ability to provide services to the public. While this might be tolerable if the legislature had so ordered, it is intolerable when the legislature has carefully fashioned and twice enacted legislation that explicitly protects Amici's members from this risk. Therefore, Amici hope for the opportunity to participate in the process of the Court's consideration and resolution of this appeal.

STATEMENT OF FACTS

The Michigan Municipal League and the Michigan Municipal League Liability & Property Pool rely upon the statement of facts as set forth in defendants-appellants' brief on appeal.

ARGUMENT

THE CITY OF WARREN SHOULD HAVE PREVAILED ON ITS GOVERNMENTAL IMMUNITY DEFENSE BECAUSE THE COMPLAINED OF CONDUCT IS PROTECTED UNDER MCL 691.1407(1) AND MICHIGAN'S EMERGENCY MEDICAL SERVICES ACT, MCL 333.20965(2), SAVES TO AUTHORITATIVE GOVERNMENTAL UNITS THE IMMUNITY FROM TORT LIABILITY OTHERWISE AVAILABLE TO THEM

A. The History of The Statutes Support Amici's View That EMSA and GTLA Should Be Read Harmoniously To Give Cumulative Layers of Immunity

The comprehensive Emergency Medical Services Act (EMSA) (Public Act 79 of 1981) became Part 207 (Emergency Medical Services) of the Public Health Code. The Act was adopted in 1981 and was scheduled to lapse on September 30, 1989. It replaced the Emergency Personnel Act (Public Act 290 of 1976) which was repealed in 1978 when a revised Public Health Code was adopted.

The Emergency Medical Services Act, MCL 333.20701, limited liability of certain enumerated "persons" unless their acts or omissions constituted gross negligence or willful misconduct:

> When performing services consistent with the individual's training, acts or omissions of an ambulance attendant . . . do not impose liability on those individuals in the treatment of a patient when the service is performed outside a hospital. Such acts or omissions also do not impose liability on . . . the authoritative governmental unit or units. All persons named in this section . . . are protected from liability unless the act or omission was the result of gross negligence or willful misconduct. [MCL 333.20737.]

This Court in *Malcolm v City of East Detroit*, 437 Mich 132; 468 NW2d 479 (1991), addressed the meaning of the above-quoted language. In doing so, it noted the language of the preamble to the EMSA, as enacted in 1981. That language read as follows:

> An act to protect and promote the public health; to codify, revise, consolidate, classify, and add to the laws relating to public health; ... to regulate occupations, facilities, and agencies affecting the public health; ... to provide certain immunity from liability ....

When analyzing the claim against the City of East Detroit, this Court considered both the EMSA and the Governmental Tort Liability Act (GTLA). In doing so, this Court observed that it "would seem that the legislature intended to provide governmental immunity beyond that already in existence in the GTLA." *Malcolm,* 437 Mich at 142. But this Court then accepted the plaintiff's contention that the "EMSA created a new standard for determining liability when liability was to be imposed upon certain enumerated individuals and the corresponding authoritative governmental unit in emergency medical service situations." *Malcolm*, 437 Mich at 146. On the basis of this analysis, this Court concluded that §20737 of the EMSA modified §7 of the GTLA, at least with respect to the vicarious liability of a governmental unit for the acts or omissions of those persons listed in the first sentence of §20737. The *Malcolm* court read the third sentence in §20737 to indicate that individuals listed in the first sentence were directly liable for gross negligence and willful misconduct and that the authoritative governmental units listed in the second sentence were vicariously liable for those same acts or omissions that constituted gross negligence or willful misconduct by the

individuals. In the court's view, when EMSA and GTLA were read together, the text of EMSA amounted to an exception to or an amendment of the immunity granted in §7 of the GTLA.

The *Malcolm* court's analysis and decision was predicated on the prior statute, which was applicable to the claim presented in that case. In a footnote, this Court noted that the legislature, apparently in response to the Court of Appeals' *Malcolm* opinion, added subsection (2) to §20737 (which was also changed to MCL 333.20965(2)). *Malcolm,* 437 Mich at 141, note 9. read together with the GTLA to amount to an exception to or an amendment of the immunity granted in §7 of the GTLA.

Specifically, the 1990 Act added the additional explicit language that is the focus of the argument here. That language provides:

> (2) Subsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in Subsection (1). MCL 333.20965(2).[1]

B. A Textual Reading of the Applicable Provisions of EMSA and GTLA Compels a Ruling in Favor of the City of Warren

The direct and straightforward route to resolving the issue raised in this appeal is found in the language of MCL 333.20965 (1) and (2). On the one hand, the words used there clearly and plainly establish a gross negligence/willful misconduct threshold for the imposition of liability. On the other hand, the unambiguous language preserves to authoritative governmental unit defendants faced with such gross negligence

[1] Subsequent amendments to the EMSA have resulted in this language being now found at Subsection (4). The language is identical to that quoted above.

claims any and all immunity from liability otherwise provided to them by law, i.e., immunity from tort liability pursuant to MCL 691.1407 (1).

On February 13, 1994, the date when plaintiffs' cause of action arose, MCL 333.20965(1) and (2) read in pertinent part as follows:

> (1) Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, or medical director of a medical control authority or his or her designee while providing services to a patient outside a hospital or in a hospital before transferring patient care to hospital personnel, that are consistent with the individual's licensure or additional training required by the local medical control authority do not impose liability in the treatment of a patient on those individuals or any of the following persons: . .
>
> > (f) The authoritative governmental unit or units. . . .
>
> (2) Subsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1).

A textualist approach to statutory construction requires the court to construe a text "reasonably, to contain all that it means." A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* 23 (1997).

The text of MCL 333.20965(2) directs the outcome here. It proves the propriety of the City of Warren's position that plaintiffs lack a cognizable claim in avoidance of the City of Warren's governmental immunity defense. A statute is not open to construction as a matter of course, *Franks v White Pine Copper Division, Copper Range Co,* 422 Mich 636; 375 NW2d 715 (1985). It is subject to interpretation only where the language used requires interpretation, that is, where the wording is ambiguous

or where two or more constructions can be placed upon it or where it is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning (*id.*). This Court has repeatedly instructed that, when a statute's language is unambiguous, no further judicial construction is required or permitted because the legislature is presumed to have intended the meaning it plainly expressed, *People v Stone,* 463 Mich 558; 621 NW2d 702 (2001); *Massey v Mandell,* 462 Mich 375; 614 NW2d 70 (2000); and *Helder v Sruba,* 462 Mich 92; 611 NW2d 309 (2000). Stated otherwise, a clear and unambiguous statute warrants no further interpretation and requires full compliance with its provisions as written, *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc,* 461 Mich 316; 603 NW2d 257 (1999). Thus, where the legislature crafts a clear and unambiguous provision, the court must assume that the plain meaning was intended and enforce the statute as written, *People v Wager,* 460 Mich 118; 594 NW2d 487 (1999). In sum, a court must enforce the directive of a clear statute, *Frame v Nehls,* 452 Mich 171; 550 NW2d 739 (1996).

Because the legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis begins with the wording of the statute itself, *Robinson v City of Detroit,* 462 Mich 439; 459 NW2d 307 (2000) citing *Carr v General Motors Corp,* 425 Mich 313, 317; 389 NW2d 686 (1986). The words of the statute provide "the most reliable evidence of its intent . . .," *United States v Turkette,* 452 US 576, 593; 101 S Ct 2524, 69 L Ed 2d 246 (1941) and *Sun Valley Foods Co v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999). Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence,

Robinson, supra, and *University of Michigan Board of Regents v Auditor General,* 167 Mich 444; 132 NW2d 1037 (1911).

In fixing a gross negligence/willful misconduct threshold for liability in MCL 333.20965 (1), the legislature intended to provide for the uniform regulation of emergency medical services and to limit emergency personnel's exposure to liability, *Jennings v City of Southwood,* 446 Mich 125, 133; 521 NW2d 230 (1994). In *Jennings,* this Court explained that the legislature intended to shield emergency medical personnel from the liability to which they were previously exposed – liability for ordinary negligence. 446 Mich at 134. Consistent with the legislative analysis of the different versions of EMSA, §20965(1) is variously labeled as a grant of immunity or a liability immunity provision. In any event, its meaning is clear. It shields those involved in providing emergency medical services from the imposition of liability except for instances of gross negligence or willful misconduct; it exempts from liability all claims of general negligence against those enumerated individuals and entities involved in the rendition of emergency medical services. By declaring that ordinary negligence claims are not actionable, the EMSA achieves its objective of eliminating or diminishing an impediment that discouraged citizens from joining the emergency medical services profession (*id*). Nothing in the text of Subsection (1) of EMSA creates liability. The language limits liability that may exist as a matter of common law.

The meaning of MCL 333.20965 (2) is likewise clear.[2] It preserves to those protected by the Emergency Medical Services Act any "immunity from liability otherwise provided for by law...." MCL 333.20965(2).[3]

MCL 691.1407(1) grants governmental immunity, or immunity provided by law, to governmental agencies when engaged in the exercise or discharge of a governmental function. The relevant statute provided that:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise of discharge of a governmental function. Except as otherwise provided in this act, the act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

Decisions of this Court repeatedly emphasize that the immunity granted by law under §1407(1) of the GTLA is to be broadly applied such that most activities in which a governmental entity is involved will be deemed to constitute a governmental function and will be immune, *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620-621; 363 NW2d 641 (1984); *Peterman v Department of Natural Resources*, 446 Mich 177,

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[2] "Subsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1).

[3] This provision is properly seen as a legislative correction of the decision in *Malcolm v East* Detroit, 180 Mich App 633; 468 NW2d 860 (1989); reversed 437 Mich 132; 468 NW2d 479 (1991), which read the EMSA to impliedly repeal portions of the GTLA. The *Malcolm* court read the predecessor statute "to the extent it, in fact, sets different standards for immunity, . . . [to create] an exception to or an amendment of the immunity granted in §7 of the GTLA." 437 Mich at 139. It is now abundantly clear that the legislature intended the two statutes to be read harmoniously – as creating different layers of protection to those covered by both statutes. Such individuals and entities are entitled to all the protection available under both Acts – even if the parameters for the protection differ under the two statutes.

203; 521 NW2d 499 (1994); *Wade v Department of Corrections*, 439 Mich 158; 483 NW2d 26 (1992); and *Suttles v State of Michigan, Dep't of Transportation*, 457 Mich 635; 578 NW2d 295 (1998). Here, the parties do not dispute that the operation of an emergency medical services system is a governmental function. Thus, the City of Warren and its fire department are protected by governmental immunity under MCL 691.1407(1).

This immunity remains available even if it provides a different level of protection than that afforded under the EMSA. It is immunity that is "otherwise" available. Accordingly, the immunity afforded governmental agencies under MCL 691.1407(1) qualifies as "immunity from liability. . .provided by law" within the meaning of MCL 333.20965(2).

The authors of *The American Heritage Dictionary* define the term "otherwise" as follows: "1. In another way; differently. 2. Under other circumstances." Use of the word "otherwise" in §20965(2) thus signals the legislature's intent that the immunity referenced there, incorporated into the statute, and preserved for authoritative governmental unit defendants is immunity different and distinct from the liability immunity established in §20965(1). Section 20965(2) refers to the universe of immunities provided by law outside of the EMSA. It directs that those immunities remain as available defenses to the individuals and entities, including authoritative governmental agencies, listed in §20965(1). And with §20965(2) preserving all of the immunities as otherwise provided by law, there was no need for the legislature to make specific mention of any particular immunity in order for it to be available in defense of a suit filed under EMSA. Stated otherwise, the legislative decision not to specifically

mention governmental immunity from tort liability in (2) neither operates to render governmental immunity an unavailable defense nor transforms §20965(2) into ambiguous legislation.

Finally, §20965(2) speaks of the immunity cloaking the "persons" listed in §20965(1). The word "persons" clearly encompasses authoritative governmental units. They are specifically enumerated in §20965(1). Moreover, authoritative governmental units fall within EMSA's definition of "person" because MCL 333.20909(6) defines a "person" to include a "governmental agency other than an agency of the United States".

C. Plaintiffs' Interpretation Requires the Court to Revert to *Malcolm's* Erroneous Repeal-By-Implication Approach

Plaintiffs' argument is fatally flawed because it is predicated upon a mistaken and erroneous premise. Plaintiffs urge the Court to find that the legislature, in enacting the EMSA, intended to create a statutory exception to the GTLA. In other words, plaintiffs read the two statutes, conclude that the parameters of protection afforded under each differ, and then announce that the EMSA must be read to repeal by implication significant portions of the GTLA. This is inconsistent with Michigan law and any proper reading of the language of the two statutes. Plaintiffs cannot find support for their arguments in the mere fact that the EMSA is the later enacted statute. It says nothing about creating an exception to the protections afforded under the GTLA. Indeed, it explicitly states to the contrary. Had the legislature wanted the EMSA to create a statutory exception or implied repeal of the GTLA, it would have so stated clearly.

When reading the language of a statute, the language must be read in light of the backdrop of existing law. The legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws. *Walen v Dept of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). This court has cautioned that it will "infer the repeal of a statute in narrow circumstances, and there is a strong presumption against such a finding." *Donajkowski v Alpena Power Co*, 460 Mich 243, 253; 496 NW2d 574 (1999). A repeal may be inferred only (1) when it is clear that a subsequent legislative act conflicts with a prior act or (2) when a subsequent act of the legislature is intended to occupy the entire field covered by the prior enactment. *Dodak v State Administrative Bd*, 441 Mich 547, 563; 495 NW2d 539 (1993). Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction. *Dodak*, 441 Mich at 562.

As a result of these principles, the Court must analyze the provisions of the Emergency Medical Services Act and the Governmental Tort Liability Act together seeking to give effect to the text of each and to harmonize them if possible. A word or phrase is given meaning by its context or setting. *Brown v Genessee County Bd of Com'rs*, 464 Mich 430, 437; 628 NW2d 471 (2001). Canons of construction are one indication of meaning. Scalia, p 27. In fact, the court's obligation is to harmonize the two statutes. Amici present a harmonious reading that would give effect to the protection afforded to governmental entities under both Acts.

Striving to create an ambiguity where none exists, plaintiffs proffer a convoluted and confusing construction of §20965(2), one which the Court properly

rejects. Specifically, plaintiffs propose that the statute refers not to the entire universe of available immunities otherwise provided by law but only to the narrow world of individual immunity cloaking individual government employees under MCL 691.1407(2). The very premise of plaintiffs' argument is flawed; it presumes the existence of a situation where the standard for measuring the liability of an EMS governmental defendant might be different from that applied to a non-EMS governmental defendant. However, a proper application of the governing law would prevent that situation from ever occurring. Per §20965(1), if an EMS governmental-employee defendant is sued, he enjoys liability immunity and is immune from liability unless his conduct constitutes gross negligence, i.e., a substantial lack of concern for whether injury results. The same result obtains if a non-EMS governmental employee were sued, MCL 691.1407(2). The gross negligence standard applied in each instance is identical, *Jennings*, *supra*. Both defendants enjoy individual immunity from liability except for acts of gross negligence, i.e., acts evidencing a substantial lack of concern for whether injury results. Thus, plaintiffs' concerns about so-called unequal treatment of governmental defendants as the basis for their interpretation of §20965(2) are unfounded. Plaintiffs' position that, of all possible immunities provided by law, §20965(2) only saves individual immunity from tort liability is not persuasive. It contravenes the clear and plain language of the statute and is nonsensical.

Through its clear and unambiguous terms, subsection (2) provides that MCL 333.20965(1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1). The mandate of subsection (2) is clear. There

can be no conclusion other than the fact that the provisions of MCL 333.20965(2) embrace and incorporate the immunity granted authoritative governmental unit or units under MCL 691.1407(1).

D. The Court of Appeals' Erroneously Used Legislative History in Disregard of the Statutory Text

For reasons known only to it, the Court of Appeals overlooked the text of MCL 333.20965(2), proceeding instead to examine the legislative history of the statute. Legal scholars and courts have long questioned the use of legislative history to shed light on the meaning of a statute. Judge Abner Mikva quoted his colleague, Harold Leven, who once said that using legislative history is like "looking over a crowd and picking out your friends". Abner J. Mikva, *Statutory Interpretation: Getting the Law to be Less Common*, 50 Ohio St LJ 969, 982 (1998). A judge using legislative history must analyze the formal materials of the legislative process – the statutory text in light of committee reports, hearings, floor debates, earlier bills, and so forth – in identifying compromise". Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U Ch L Rev 800, 189-20 (1983). But these materials are often unavailable and, when found, often fail to yield any clear guidance. Justice Scalia has also criticized the use of legislative history on other grounds: "[t]he greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislation", *Conroy v Aniskoff*, 113 S Ct 1562, 1567; 507 US 511; 123 L Ed 2d 229 (1993) (Scalia, J, concurring). It is not "conducive to a genuine effectuation of congressional intent" to "give legislative force to each snippet of analysis" contained in the legislative history,

Blanchard v Bergeron, 489 U.S. 87, 99; 109 S Ct 939; 103 L Ed 2d 67 (1989) (Scalia, J, concurring in part and concurring in the judgment). At best, legislative history is a problematic source of statutory interpretation. It is not law; and its evidentiary value is often weak.

Despite this, the Court of Appeals ignored the statutory text and grounded its decision on the legislative history. Michigan courts have historically guarded against improper use of legislative history to override statutory text by requiring a finding that a statute is ambiguous or of doubtful meaning before the door is open to judicial determination of legislative intent. The mere fact that a statute appears impolitic or unwise is not sufficient for judicial construction but is a matter for the legislature, *City of Lansing v Lansing Township,* 356 Mich 641; 97 NW2d 804 (1959). This is consistent with the notion that courts have no right to distort legislative expressions that are clear and intelligible, *Jones v Grand Ledge Public Schools,* 349 Mich 1; 84 NW2d 327 (1957).

Moreover, the Court of Appeals read the legislative history of EMSA in an overly restrictive manner. To the court's reading of the legislative history, there was "no evidence or expressed intention in the legislative analysis to eliminate vicarious liability by incorporating the provisions of the GTLA". Amici disagrees. In fact, in the House Bill Analysis HB4952, First Analysis, December 11, 1989, one of the major changes noted by the drafters was the expansion of the immunity provisions of the Comprehensive Emergency Medical Services Act. Concerning that, the analysis stated as follows:

> Immunity provisions. Under present law, ambulance attendants, EMT's, EMT specialists, and advanced EMT's (as well as their back up staff), are immune from liability when giving care consistent with their training unless there is gross negligence or willful misconduct.
>
> The bill would give immunity to medical first responders, EMT's, EMT specialists, paramedics, and medical directors at a medical control authority while providing services to a patient either outside a hospital or in a hospital before transferring patient care to hospital personnel, provided that the act or omission was (a) consistent with the individuals' licensure and training, and (b) was not the result of gross negligence or willful misconduct. Backup staff (the authorizing physician, the medical director, communications personnel, the life support agency and staff, the hospital and staff, the governmental unit, or emergency personnel from outside the state) also would be given immunity under these conditions. The bill specifically would not limit immunity from liability otherwise provided by law for anyone covered by this section. [Emphasis added.]

Thus, when carefully examined, the legislative history of MCL 333.20965 supports the City of Warren's contention that, taken together, MCL 333.20965(2) and MCL 691.1407(1) afford authoritative governmental units operating emergency medical services separate but consecutive layers of immunity. Far from abrogating or diminishing the governmental immunity afforded governmental agencies in the GTLA, MCL 333.20965(2) embraces, encompasses and incorporates the governmental function immunity found there. A bare reading of the statute should suffice here. In no uncertain terms, MCL 333.20965(2) saves for an authoritative government unit or units sued for

gross negligence or willful misconduct the immunity from liability otherwise available to those entities by law. MCL 333.20965(2) and MCL 691.1407(1) can and should be read harmoniously.

This reading is consistent with the rule that statutes *in pari materia* are appropriately read together and harmonized, *Lindsey v Harper Hospital*, 455 Mich 56, 564 NW2d 861 (1997), *Wayne County v State Dept of Social Welfare*, 343 Mich 475, 72 NW2d 200 (1955), and *Thorne v Jones*, 335 Mich 658, 57 NW2d 40 (1953). Stated otherwise, if statutes lend themselves to a construction that avoids conflict, that construction should control, *Jackson Community College v Michigan Dep't of Treasury*, 241 Mich App 673, 621 NW2d 707 (2000). The law of Michigan, like that in other jurisdictions, presumes that statutes can be harmonized and that the legislative body did not impliedly repeal a statute, *Dodak,* 441 Mich at 562-563. This presumption is based on the notion that "the drafters should expressly designate the offending provisions rather than leave the repeal to arise by implication from the latter enactment", 1A *Singer, Sutherland Statutory Construction* (4th ed), §23.10, p 346 quoted with approval in *Dodak*, 441 Mich at 563. This strong presumption against repeal by implication also stems from the judiciary's obligation to give effect to the dictates of the legislature, not to rule that portions are to be treated as a nullity.

Properly read, EMSA and GTLA are harmonious statutes. Both afford governmental defendants immunity from tort liability. The former not only grants liability immunity from claims of ordinary negligence, MCL 333.20965(1), it also embraces and incorporates all immunity otherwise provided by law in MCL

333.20965(2). The latter constitutes governmental function immunity, is one of the immunities provided by law as referenced in MCL 333.20965(2).

In clear, concise and direct terms, the language of MCL 333.20965(2) refers to the immunity provided governmental agencies in MCL 691.1407(1), that being immunity "otherwise provided by law". Nothing in MCL 333.20965 is properly read to exclude immunity under the provisions of MCL 691.1407(1). The effect of MCL 333.20965(2) is plain, to-wit: in the face of a claim for gross negligence or willful misconduct rising in the context of the provision of emergency medical services, an authoritative governmental unit remains immune from tort liability pursuant to the provisions of MCL 691.1407(1). The EMSA explicitly embraces the immunity "otherwise provided by law" to governmental agencies via the terms and provisions of the governmental tort liability act. Adherence to EMSA's directives preserves that immunity for defendant City of Warren.

The Court of Appeals was bound to give due deference to the clear and plain language of MCL 333.20965(2) and was not free to supplant its views for those of the legislature, effectively challenging the legislature's wisdom, *Oakland County Bd of County Road Commissioners v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 575 NW2d 751 (1998) and *Council of Organizations and Others for Education about Parochiaid, Inc, v Governor*, 455 Mich 557; 566 NW2d 208 (1997). In short, the wisdom of legislation is for the legislature; it is not a matter within the province of the courts. In recognition of the fact, the court in *Glancy v City Of Roseville*, 457 Mich 580; 577 NW2d 897 (1998) reiterated in the context of interpreting Michigan's GTLA that the

responsibility for drawing lines in a complex society, for identifying priorities, for weighing the relevant considerations, and for choosing between competing alternatives is the legislature's, not the judiciary's.

The statutes are capable of being harmonized because there is nothing in the language of MCL 333.20965 that explicitly recites that the statute provides an exception to the GTLA. Nor does the wording of MCL 333.20965 imply or suggest that it stands as a statutory exception to governmental immunity. In fact, the language clearly and unambiguously preserves for authoritative governmental units the immunity from tort liability otherwise provided to them by law and so does precisely the opposite of what plaintiffs propose. It would be curious indeed for the legislature to purportedly create an exception to governmental immunity by including in §20965 language that "[s]ubsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)." One might wonder what more the legislature could possibly have done in order to satisfy plaintiffs and to make it manifestly clear that the legislature intended to embrace and to incorporate in §209965(2) the governmental immunity from tort liability cloaking governmental agencies in MCL 691.1407(1).

E. A Proper Textualist Approach to Reading the EMSA and GTLA Requires a Fresh Look Unclouded by *Malcolm's* Influence

Notwithstanding the passage of a new statute, the analytical framework employed by the Michigan Court of Appeals in *Malcolm* and embraced by the Michigan Supreme Court in its *Malcolm* decision have had a pervasive and negative effect on efforts to interpret and to apply the EMSA in connection with governmental employees

and agencies. Amici's fresh and unclouded approach to reading the two statutes would result in an analysis that harmonizes the statutes and affords governmental agencies and employees all of the protections from liability intended by Michigan's Legislature under both statutes. *Malcolm* erred in reading one as a statutory exception or implied repeal and amendment of the other. Despite the legislature's conduct in repudiating the Court of Appeals' analysis, this Court echoed that analysis in its *Malcolm* decision. Although this Court's *Malcolm* decision might not have affected the outcome in the particulars of the case before it, the Court's decision opened the door to further misinterpretation and misunderstanding of the two statutes. This misinterpretation and misunderstanding has resulted in a diminution of the layers of liability limitations and immunity protection created by the Michigan Legislature in these two statutory schemes.

Even the formulation of the question in this Court's leave grant order evidences the influence of *Malcolm*. This Court asked:

> The parties are directed to address the issue of statutory interpretation posed by the interaction between MCL 691.1407(1) and MCL 333.20965(1): Does MCL 333.20965(4) refer to the general immunity provided to governmental units in MCL 691.1407(1) so as to require a reading of MCL 33.20965(1) that effectively reinstates the immunity that Section 20965(1) purported to eliminate for acts or omissions of emergency medical personnel resulting from gross negligence or willful misconduct?

The question assumes that §20965(1) purported to eliminate immunity for acts or omissions of emergency medical personnel resulting from gross negligence or willful misconduct. That assumption is based upon a reading of the two statutes as being in conflict and a conclusion that the EMSA was intended to eliminate immunity that had

previously been created in the GTLA. In other words, the question assumes that EMSA was a statutory exception or implied repeal and amendment of the GTLA to the extent it provided lesser protection than that already available to governmental employees and agencies. This erroneous assumption has its origins in the *Malcolm* case.

Reading the two statutes together should afford governmental agencies and their employees all of the protection intended by the legislature in each statute. It is akin to an individual wearing a sweater which provides protection from the elements and then also having available a cloak to provide additional and further protection from the winter cold and the elements. EMSA's sweater is protection from liability, absent gross negligence and willful misconduct. GTLA's cloak is governmental function and statutory immunity. Governmental agencies are entitled to all of the protection afforded under each of these statutes. A proper reading of Subsection (2) comports with Amici's analogy. The legislature has explicitly declared that both the sweater of EMSA protection and the cloak of GTLA immunity are available to authoritative governmental units.

The net effect of this proffered reading of the two statutes is to require a court to analyze potential liability under each statute. A proper analysis would afford the governmental agency or employee all of the protection afforded under EMSA and all of the protection afforded under GTLA. If either bars a claim by its liability limiting provisions or immunity granting provisions, then the governmental entity or agency is entitled to that protection.

Subsections (1) and (2) conflict only if, as plaintiffs urge, Subsection (1) is read to create a statutory exception to the governmental immunity granted in the GTLA. Under this reading, and in contravention of its clear and unambiguous terms, Subsection (2) would not preserve to authoritative governmental unit defendants all of the immunity from liability otherwise provided to them by law. Contrarily, Amici's proposed reading of the statutory provisions harmonizes them and allows for the operation of both. If, as Amici contends, (2) is deemed to embrace and to preserve governmental immunity for authorized governmental defendants, (1) would still apply as it would govern claims against nongovernmental defendants as well as individual governmental employee defendants engaged in emergency medical services.

In the legislative analysis materials accompanying Senate Bill 0404, that containing the most recent amendments to MCL 333.20965, note is made of the fact that the provision of emergency medical services to the public is a "vital component of the overall delivery of health care in the state". The materials also make mention of the steady evolution of emergency medical services such that today's emergency medical system is composed of several elements that must work together to achieve successful patient outcomes. All of this is discussed in conjunction with the need for a clear determination of the duties and obligations of the personnel and entities involved in emergency medical care systems. To Amici's view of the situation, the legislature has afforded clear and explicit direction when it comes to ascertaining and measuring the liability of authoritative governmental units operating as part of the emergency medical system.

The lines of liability are apparent in the wording of MCL 333.20965(2). A governmental unit operating an emergency medical services system enjoys the immunity provided by MCL 691.1407(1) and by MCL 333.20965(2). Those are consecutive and cumulative layers of immunity. They are not mutually exclusive. They are both available to the City of Warren to the end that the City should have prevailed.

RELIEF

WHEREFORE, Amici Michigan Municipal League and Michigan Municipal League Liability & Property Pool respectfully request that the Court grant the City of Warren's requested relief and reverse the June 23, 2000 opinion of the Michigan Court of Appeals and reinstate the Order Granting Summary Disposition entered by the Macomb County Circuit Court.

PLUNKETT & COONEY, P.C.

BY: Christine D. Oldani

MARY MASSARON ROSS (P43885)
CHRISTINE D. OLDANI (P25596)
Attorneys for Michigan Municipal League and the Michigan Municipal League Liability & Property Pool
243 West Congress, Suite 800
Detroit, MI 48226-3260
(313) 965-3900

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